Referral

[redacted]

From: Sims, Deitrich (EOIR)
Sent: Tuesday, March 06, 2018 1:45 PM
To: EOIR (b)(6) [redacted] >
Subject: RE: Big change for asylum

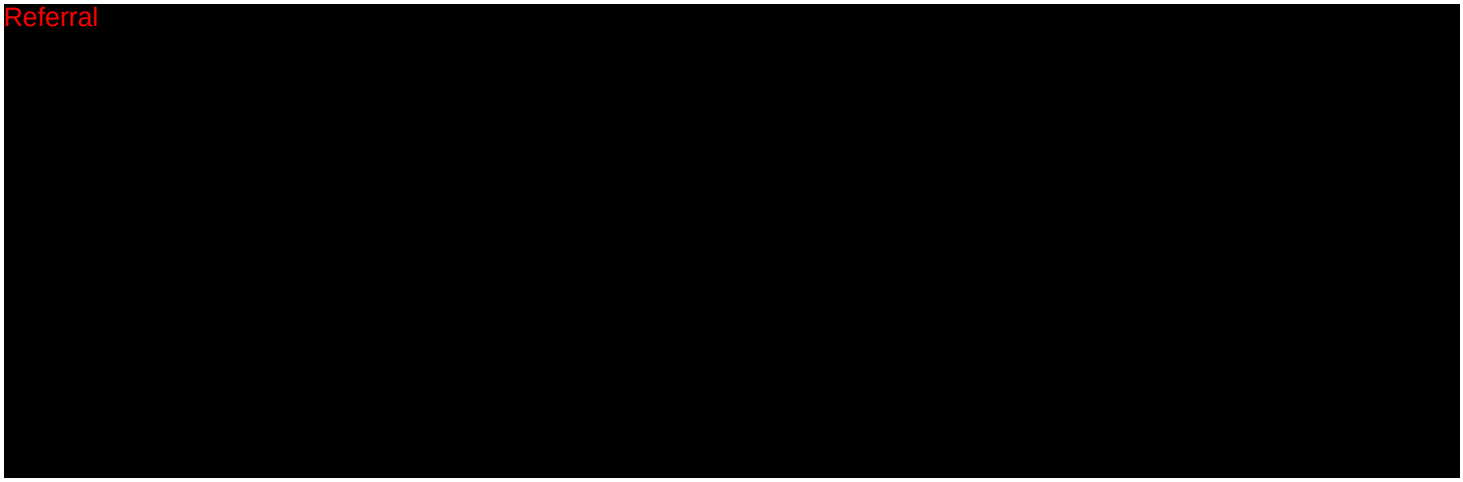
That's a question unanswered. The AG vacated E-R-H-L, but did not give any guidance ongoing forward. Essentially, it was vacated on the basis that the respondent withdrew the asylum application with prejudice. The AG also wants the case recalendared even though there was a joint motion to administrative close the case to allow adjudication of an I-130 petition. I'm not sure how EOIR (b)(5) DP [redacted]. I also think EOIR (b)(5) DP [redacted] Stay tune more to follow.
Take care.

Judge Sims

Referral

[redacted]

Referral



From:	Slavin, Denise (EOIR)
To:	Sims, Deitrich (EOIR)
Cc:	Slavin, Denise (EOIR)
Subject:	RE: Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018)
Date:	Tuesday, March 06, 2018 3:53:15 PM

OMG, that is so bizzare!

From: Sims, Deitrich (EOIR)
Sent: Tuesday, March 06, 2018 1:47 PM
To: Slavin, Denise (EOIR) <Denise.Slavin@EOIR.USDOJ.GOV>
Subject: FW: Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018)

FYI,

This is my case. Not only is this my case, but the few times I AC a case pursuant to *Avetisyan* I'm told I'm wrong and to recalendar. The irony does not escape me.

Deitrich

From: Ferris, Brittany (EOIR)
Sent: Monday, March 05, 2018 1:47 PM
To: All of Court Administrators (EOIR) <All_of_Court_Administrators@EOIR.USDOJ.GOV>; All of Judges (EOIR) <All_of_Judges@EOIR.USDOJ.GOV>; All of OCIJ HDQ (EOIR) <AllofOCIJHDQEOIR@EOIR.USDOJ.GOV>; All of OCIJ JLC (EOIR) <AllofOCIJJLCEOIR@EOIR.USDOJ.GOV>; BIA ATTORNEYS (EOIR) <BIA_ATTORNEYS@EOIR.USDOJ.GOV>; BIA BOARD MEMBERS (EOIR) <BIA_BOARD_MEMBERS@EOIR.USDOJ.GOV>; EOIR Library (EOIR) <EOIR_Library@EOIR.USDOJ.GOV>; BIA SUPPORT (EOIR) <BIA_SUPPORT@EOIR.USDOJ.GOV>; BIA TEAM P (EOIR) <BIA_TEAM_P@EOIR.USDOJ.GOV>; Butler, Vicki A. (EOIR) <Vicki.Butler@EOIR.USDOJ.GOV>; Carr, Donna (EOIR) <Donna.Carr@EOIR.USDOJ.GOV>; King, Jean (EOIR) <Jean.King@EOIR.USDOJ.GOV>; OGC (EOIR) <OGC@EOIR.USDOJ.GOV>; McHenry, James (EOIR) <James.McHenry@EOIR.USDOJ.GOV>; Reilly, Katherine - OGC (EOIR) <Katherine.Reilly@EOIR.USDOJ.GOV>; Santoro, Christopher A (EOIR) <Christopher.Santoro@EOIR.USDOJ.GOV>; Alder Reid, Lauren (EOIR) <Lauren.AlderReid@EOIR.USDOJ.GOV>; Berkeley, Nathan (EOIR) <Nathan.Berkeley@EOIR.USDOJ.GOV>; Cowles, Jon (EOIR) <Jon.Cowles@EOIR.USDOJ.GOV>; Bauder, Melissa (EOIR) <Melissa.Bauder@EOIR.USDOJ.GOV>; Korniluk, Artur (EOIR) <Artur.Korniluk@EOIR.USDOJ.GOV>; Adams, Amanda (EOIR) <Amanda.Adams@EOIR.USDOJ.GOV>; Pease, Jeffrey (EOIR) <Jeffrey.Pease@EOIR.USDOJ.GOV>
Cc: Rose, Karen (EOIR) <Karen.Rose@EOIR.USDOJ.GOV>; Atkinson, Pamela (EOIR) <Pamela.Atkinson@EOIR.USDOJ.GOV>
Subject: Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018)

The above precedent decision can be found in Volume 27 at page 226. The link to the decision is:

Intranet:
(b)(7)(E) [redacted]

The Attorney General referred the decision of the Board of Immigration Appeals in *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014), to himself for review and vacated that decision.

Brittany R. Ferris
DOJ/EOIR/BIA
703.605.5265

From: Baird, Michael P. (EOIR)
To: Sims, Deitrich (EOIR)
Subject: decision template
Date: Wednesday, March 07, 2018 8:55:34 AM

Good Morning Deitrich:

I hope that you are doing well. I am on detail to Oakdale and enjoying my visit.

Congratulations on the AGs decision to vacate EFHL – what good news! That is great progress for our courts.

I have been extolling the virtues of pretermission to Johnny Duck and he asked me to reach out to you and see if you could send me a template or old copy of a written decision pretermitting a 589 for failure to state a claim.

Any help would be appreciated.

Thanks,
Mike

From: Sims, Deitrich (EOIR)
To: Lane, Denise (EOIR)
Subject: FW: Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018)
Date: Wednesday, March 07, 2018 3:59:00 PM

FYI, this is my case.
Deitrich

From: Ferris, Brittany (EOIR)
Sent: Monday, March 05, 2018 1:47 PM
To: All of Court Administrators (EOIR) <All_of_Court_Administrators@EOIR.USDOJ.GOV>; All of Judges (EOIR) <All_of_Judges@EOIR.USDOJ.GOV>; All of OCIJ HDQ (EOIR) <AllofOCIJHDQEOIR@EOIR.USDOJ.GOV>; All of OCIJ JLC (EOIR) <AllofOCIJJLCEOIR@EOIR.USDOJ.GOV>; BIA ATTORNEYS (EOIR) <BIA_ATTORNEYS@EOIR.USDOJ.GOV>; BIA BOARD MEMBERS (EOIR) <BIA_BOARD_MEMBERS@EOIR.USDOJ.GOV>; EOIR Library (EOIR) <EOIR_Library@EOIR.USDOJ.GOV>; BIA SUPPORT (EOIR) <BIA_SUPPORT@EOIR.USDOJ.GOV>; BIA TEAM P (EOIR) <BIA_TEAM_P@EOIR.USDOJ.GOV>; Butler, Vicki A. (EOIR) <Vicki.Butler@EOIR.USDOJ.GOV>; Carr, Donna (EOIR) <Donna.Carr@EOIR.USDOJ.GOV>; King, Jean (EOIR) <Jean.King@EOIR.USDOJ.GOV>; OGC (EOIR) <OGC@EOIR.USDOJ.GOV>; McHenry, James (EOIR) <James.McHenry@EOIR.USDOJ.GOV>; Reilly, Katherine - OGC (EOIR) <Katherine.Reilly@EOIR.USDOJ.GOV>; Santoro, Christopher A (EOIR) <Christopher.Santoro@EOIR.USDOJ.GOV>; Alder Reid, Lauren (EOIR) <Lauren.AlderReid@EOIR.USDOJ.GOV>; Berkeley, Nathan (EOIR) <Nathan.Berkeley@EOIR.USDOJ.GOV>; Cowles, Jon (EOIR) <Jon.Cowles@EOIR.USDOJ.GOV>; Bauder, Melissa (EOIR) <Melissa.Bauder@EOIR.USDOJ.GOV>; Korniluk, Artur (EOIR) <Artur.Korniluk@EOIR.USDOJ.GOV>; Adams, Amanda (EOIR) <Amanda.Adams@EOIR.USDOJ.GOV>; Pease, Jeffrey (EOIR) <Jeffrey.Pease@EOIR.USDOJ.GOV>
Cc: Rose, Karen (EOIR) <Karen.Rose@EOIR.USDOJ.GOV>; Atkinson, Pamela (EOIR) <Pamela.Atkinson@EOIR.USDOJ.GOV>
Subject: Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018)

Duplicate

[redacted]

Brittany R. Ferris
DOJ/EOIR/BIA
703.605.5265

From:	Perez-Guzman, Virginia (EOIR)
To:	Sims, Deitrich (EOIR); Ozmun, Richard (EOIR); Nugent, James A. (EOIR); Davis-Gumbs, Xiomara D. (EOIR); Kimball, R. Wayne (EOIR)
Cc:	Gault, Allyson D. (EOIR); Smith, Megan A. (EOIR); Zaben, Mohamad (EOIR)
Subject:	FYI on E-F-H-L (for those that have not already seen this)
Date:	Thursday, March 08, 2018 1:13:39 PM

Sessions Eliminates Right To Hearing For Some Asylum Seekers.

Axios (3/7, Kight, 1.31M) reports, "This week, Attorney General Jeff Sessions reversed a decision that gave asylum-seekers and applicants for withholding of removal a right to a full hearing even after deemed ineligible for asylum according to their paperwork." Sessions' decision "upended the precedent set by the Board of Immigration Appeals (BIA) four years ago." Axios says the decision is an "attempt to curtail the growing backlog in immigration courts by allowing quicker denials of these kinds of applications without a hearing." DOJ spokesman Devin O'Malley "told Axios the BIA's decision had 'added unnecessary cases to the dockets of immigration judges who are working hard to reduce an already large immigration court backlog.'" Law360 (3/6, 10K) reports similarly in a pay-wall article.

The Washington Post (3/7, Olivo, 15.96M) reports that the decision by Session allows immigration judges to "reject asylum petitions without a full hearing if, upon initial review, they appear to be fraudulent or unlikely to succeed." In response, immigration advocates "said thousands of people seeking asylum are now at risk of being sent back to life-threatening situations in their homelands without an adequate opportunity to prove they would be in danger if deported."

According to Quartz (3/7, Campoy, 901K), an unnamed Justice Department official said Sessions' decision "added unnecessary cases to the dockets of immigration judges, who are working hard to reduce an already large immigration court backlog." Quartz highlights the "Matter of E-F-H-L" which Sessions is revisiting, as well as immigration judges' use of administrative closure, and emphasizes that Sessions' moves may lead to higher numbers of deportations.

From:	Smith, Megan A. (EOIR)
To:	Perez-Guzman, Virginia (EOIR); Sims, Deitrich (EOIR); Ozmun, Richard (EOIR); Nugent, James A. (EOIR); Davis-Gumbs, Xiomara D. (EOIR); Kimball, R. Wayne (EOIR)
Cc:	Gault, Allyson D. (EOIR); Zaben, Mohamad (EOIR)
Subject:	Sample Decisions Pretermitting Asylum/WTH
Date:	Friday, March 09, 2018 3:58:18 PM
Attachments:	IJ Baird- Pretermit ASY-WTH - Perceived wealth not PSG.doc IJ Kimball- Pretermit Asylum Abused Women.docx IJ Ozmun - Pretermit Asylum Women victim of gang sexual abuse.docx IJ Sims - Pretermit ASY-WTH, CAT.docx Matter of Fefe (BIA 1989).pdf 124011 Ancillary matters applications.pdf

Hello,

One of the judges requested that I share past decisions pretermitting asylum and withholding of removal. Please find attached four decisions from 2014. If you would like more samples, please just let me know.

Briefly, I would like to note that all the decisions pretermitting asylum or withholding of removal generally had three aspects in common:

- The Court based its decision assuming all the facts in evidence were true;
- Relief was pretermitted because the PSG was not cognizable. I did not find any decisions where the applicant sought asylum based on one of the other four protected grounds; and
- The IJ gave both parties the opportunity to brief the PSG in some of the decisions.

Lastly, while *Matter of E-F-H-L*, 26 I&N Dec. 319 (BIA 2014) has been reversed, its predecessor, *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989), (b)(5) DP In *Matter of Fefe*, the Board instructed that at minimum "the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct." 20 I&N Dec. at 118. Until more guidance is provided, *Matter of Fefe* and the regulations (b)(5) DP for pretermitting an I-589 application. I've attached electronic copies of *Matter of Fefe* and the relevant portion of the regulations, 8 C.F.R. 1240.11(c), to this email as well.

Please let me know if I can provide any further information or if you would like to discuss this further.

Best,

Megan

Megan Smith
Attorney Advisor
Department of Justice
Executive Office for Immigration Review
1100 Commerce Street, Suite 1060
Dallas, TX 75242
214-761-5343

Code of Federal Regulations
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice (Refs & Annos)
Subchapter B. Immigration Regulations (Refs & Annos)
Part 1240. Proceedings to Determine Removability of Aliens in the United States (Refs & Annos)
Subpart A. Removal Proceedings

8 C.F.R. § 1240.11

§ 1240.11 Ancillary matters, applications.

Effective: April 29, 2013
Currentness

(a) Creation of the status of an alien lawfully admitted for permanent residence.

(1) In a removal proceeding, an alien may apply to the immigration judge for cancellation of removal under section 240A of the Act, adjustment of status under section 1 of the Act of November 2, 1966 (as modified by section 606 of Pub.L. 104 208), section 101 or 104 of the Act of October 28, 1977, section 202 of Pub.L. 105 100, or section 902 of Pub.L. 105 277, or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of § 1240.20, and 8 CFR parts 1245 and 1249. The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by an alien entrepreneur (as defined in section 216A(f)(1) of the Act) shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act, or the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the director in accordance with 8 CFR part 1216.

(2) In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the alien is inadmissible under any provision of section 212(a) of the Act, and believes that he or she meets the eligibility requirements for a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for such waiver. The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of § 1240.8(d). In a relevant case, the immigration judge may adjudicate the sufficiency of an Affidavit of Support Under Section 213A (Form I 864), executed on behalf of an applicant for admission or for adjustment of status, in accordance with the provisions of section 213A of the Act and 8 CFR part 213a.

(3) In exercising discretionary power when considering an application for status as a permanent resident under this chapter, the immigration judge may consider and base the decision on information not contained in the record and not made available for inspection by the alien, provided the Commissioner has determined that such information is relevant and is classified under the applicable Executive Order as requiring protection from unauthorized disclosure in the interest of national security. Whenever the immigration judge believes that he or she can do so while safeguarding both the information and its source, the immigration judge should inform the alien of the general nature of the information in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

(b) Voluntary departure. The alien may apply to the immigration judge for voluntary departure in lieu of removal pursuant to section 240B of the Act and subpart C of this part. The immigration judge shall advise the alien of the consequences of filing a post-decision motion to reopen or reconsider prior to the expiration of the time specified by the immigration judge for the alien to depart voluntarily.

(c) Applications for asylum and withholding of removal.

(1) If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be removed pursuant to § 1240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum officer in accordance with § 1208.14 of this chapter, the immigration judge shall:

(i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries;

(ii) Make available the appropriate application forms; and

(iii) Advise the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum. The immigration judge shall provide to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(2) An application for asylum or withholding of removal must be filed with the Immigration Court, pursuant to § 1208.4(b) of this chapter. Upon receipt of an application, the Immigration Court may forward a copy to the Department of State pursuant to § 1208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, from the Department of State, unless classified under an applicable Executive Order, shall be given to both the alien and to DHS counsel and shall be included in the record.

(3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

(i) Evidentiary hearings on applications for asylum or withholding of removal will be open to the public unless the alien expressly requests that the hearing be closed pursuant to § 3.27 of this chapter. The immigration judge shall inquire whether the alien requests such closure.

(ii) Nothing in this section is intended to limit the authority of the immigration judge to properly control the scope of any evidentiary hearing.

(iii) During the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf. The alien has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act pursuant to the standards set forth in § 1208.13 of this chapter.

(iv) Service counsel may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information, he or she shall inform the alien. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the alien, whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its sources. The summary should be as detailed as possible, in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state whether such information is material to the decision.

(4) The decision of an immigration judge to grant or deny asylum or withholding of removal shall be communicated to the alien and to the Service counsel. An adverse decision shall state why asylum or withholding of removal was denied.

(d) Application for relief under sections 237(a)(1)(H) and 237(a)(1)(E)(iii) of the Act. The respondent may apply to the immigration judge for relief from removal under sections 237(a)(1)(H) and 237(a)(1)(E)(iii) of the Act.

(e) General. An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his or her alienage or deportability. However, nothing in this section shall prohibit the Service from using information supplied in an application for asylum or withholding of deportation or removal submitted to the Service on or after January 4, 1995, as the basis for issuance of a charging document or to establish alienage or deportability in a case referred to an immigration judge under § 1208.14(b) of this chapter. The alien shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. Nothing contained in this section is intended to foreclose the respondent from applying for any benefit or privilege that he or she believes himself or herself eligible to receive in proceedings under this part. Nothing in this section is intended to limit the Attorney General's authority to remove an alien to any country permitted by section 241(b) of the Act.

(f) Fees. The alien shall not be required to pay a fee on more than one application within paragraphs (a) and (c) of this section, provided that the minimum fee imposed when more than one application is made shall be determined by the cost of the application with the highest fee. When a motion to reopen or reconsider is made concurrently with an application for relief seeking one of the immigration benefits set forth in paragraphs (a) and (c) of this section, only the fee set forth in § 103.7(b)(1) of 8 CFR chapter I for the motion must accompany the motion and application for relief. If such a motion is granted, the appropriate fee for the application for relief, if any, set forth in 8 CFR 103.7(b)(1), must be paid within the time specified in order to complete the application.

(g) Safe third country agreement.

(1) The immigration judge has authority to apply section 208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to a safe third country pursuant to a bilateral or multilateral agreement (Agreement), in

the case of an alien who is subject to the terms of the Agreement and is placed in proceedings pursuant to section 240 of the Act. In an appropriate case, the immigration judge shall determine whether under the Agreement the alien should be returned to the safe third country, or whether the alien should be permitted to pursue asylum or other protection claims in the United States.

(2) An alien described in paragraph (g)(1) of this section is ineligible to apply for asylum, pursuant to section 208(a)(2)(A) of the Act, unless the immigration judge determines, by preponderance of the evidence, that:

(i) The Agreement does not apply to the alien or does not preclude the alien from applying for asylum in the United States; or

(ii) The alien qualifies for an exception to the Agreement as set forth in paragraph (g)(3) of this section.

(3) The immigration judge shall apply the applicable regulations in deciding whether the alien qualifies for any exception under the Agreement that would permit the United States to exercise authority over the alien's asylum claim. The exceptions under the Agreement are codified at 8 CFR 208.30(e)(6)(iii). The immigration judge shall not review, consider, or decide any issues pertaining to any discretionary determination on whether the alien should be permitted to pursue an asylum claim in the United States notwithstanding the general terms of the Agreement, as such discretionary public interest determinations are reserved to DHS. However, an alien in removal proceedings who is otherwise ineligible to apply for asylum under the Agreement may apply for asylum if DHS files a written notice in the proceedings before the immigration judge that it has decided in the public interest to allow the alien to pursue claims for asylum or withholding of removal in the United States.

(4) An alien who is found to be ineligible to apply for asylum under section 208(a)(2)(A) of the Act is ineligible to apply for withholding of removal pursuant to section 241(b)(3) of the Act and the Convention against Torture. However, the alien may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to section 208(a)(2)(A) of the Act is ordered removed, the alien shall be ordered removed to the safe third country in which the alien will be able to pursue his or her claims for asylum or protection against persecution or torture under the laws of that country.

Credits

[62 FR 45150, Aug. 26, 1997; 63 FR 27829, May 21, 1998; 64 FR 25766, May 12, 1999; 65 FR 15844, 15854, March 24, 2000; 68 FR 10355, March 5, 2003; 69 FR 69497, Nov. 29, 2004; 71 FR 35757, June 21, 2006; 73 FR 76937, Dec. 18, 2008; 78 FR 19080, March 29, 2013]

SOURCE: 62 FR 10367, March 6, 1997; 63 FR 27829, May 21, 1998; 64 FR 25766, May 12, 1999; 64 FR 27875, May 21, 1999; 65 FR 15844, March 24, 2000; 68 FR 9830, 9832, Feb. 28, 2003; 68 FR 9830, Feb. 28, 2003; 68 FR 9838, Feb. 28, 2003; 69 FR 57835, Sept. 28, 2004; 69 FR 69497, Nov. 29, 2004; 70 FR 674, Jan. 5, 2005; 71 FR 35757, June 21, 2006; 78 FR 19080, March 29, 2013, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub.L. 105 100 (111 Stat. 2160, 2193); sec. 902, Pub.L. 105 277 (112 Stat. 2681).

Notes of Decisions (28)

Current through March 1, 2018; 83 FR 8801.

End of Document

MATTER OF FEFE

In Exclusion Proceedings

A-28556[illegible]62

Decided by Board August 1, 1989

(1) An applicant for asylum cannot meet his burden of proof unless he testifies under oath regarding his application; and, therefore, an immigration judge should not proceed to adjudicate a written application for asylum if no oral testimony has been offered in support of that application.

(2) At a minimum, the regulations require that an asylum applicant take the stand, be placed under oath, and be questioned as to whether the information in his written application is complete and correct; the examination of an applicant will ordinarily be this brief only where the parties have stipulated that the applicant's oral testimony would be consistent with his written application and that his testimony would be believably presented.

EXCLUDABLE: Act of 1952—Sec. 212(a)(19) [8 U.S.C. § 1182(a)(19)]—Fraud or willful misrepresentation of a material fact

Sec. 212(a)(20) [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

ON BEHALF OF APPLICANT:
Candace L. Jean, Esquire
7103 S.W. 102 Avenue
Miami, Florida 33173

ON BEHALF OF SERVICE:
John R. Frenkel
General Attorney

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

In a decision dated February 17, 1989, the immigration judge denied the applicant's requests for asylum and withholding of deportation pursuant to sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h) (1982), and ordered that the applicant be excluded and deported from the United States. The applicant appealed. The record will be remanded for further proceedings.

The applicant is a 24-year-old native and citizen of Haiti. He arrived in the United States on November 5, 1988. The Immigration and Naturalization Service then initiated exclusion proceedings against the applicant by issuing a Notice to Applicant for Admission Detained for Hearing before Immigration Judge (Form I-122) which

alleged that the applicant was inadmissible to the United States pursuant to sections 212(a)(19) and (20) of the Act, 8 U.S.C. §§ 1182(a)(19) and (20) (1982).

At his exclusion hearing, the applicant did not contest his excludability, but he requested asylum. He completed a Request for Asylum in the United States (Form I-589), including a two-page, typewritten addendum providing details concerning his fear of persecution in Haiti, which was forwarded to the Department of State Bureau of Human Rights and Humanitarian Affairs for an advisory opinion. *See* 8 C.F.R. § 236.3(a)(1) (1988).

The applicant appeared with counsel for the hearing on the merits of his asylum application. Applicant's counsel stated that because "the I-589 [is] such an extensive story in itself, we'll just rest on that." The Service attorney also declined to ask the applicant any questions concerning his written asylum request, stating that he was "not going to cross examine." In a closing statement, the Service attorney raised various questions regarding the nature of the information provided in the applicant's affidavit. The immigration judge then entered his decision denying the applicant's requests for asylum and withholding of deportation. In his decision, the immigration judge reviewed the applicant's written testimony but described his statements as "self-serving." The immigration judge also noted that the applicant had offered no corroboration for his Form I-589, and he stated that "[w]e don't know whether his story is true or not."

On appeal, the applicant contends that the immigration judge erred in denying his applications for asylum and withholding of deportation.[1] We find that the record should be remanded because the immigration judge has not complied with the regulations concerning asylum hearings.

The regulations regarding the procedure for adjudication of asylum applications provide at 8 C.F.R. § 208.6 (1988) that an "applicant shall be examined in person by an immigration officer or judge prior to the adjudication of the asylum application." The regulations further provide at 8 C.F.R. § 236.3(a)(2) (1988) that when an applicant requests asylum in exclusion proceedings, he "shall be examined under oath on his application and may present evidence on his behalf." *See also* 8 C.F.R. § 242.17(c) (1988). In *Matter of Balibundi*, 19 I&N Dec. 606 (BIA 1988), we held that in light of the requirement that an asylum applicant must be examined under oath, an immigration judge

[1] The applicant's current counsel also contends that the applicant received ineffective assistance of counsel at his exclusion hearing. Because the record will be remanded for a hearing de novo, we need not address this argument.

should not adjudicate an asylum application where an applicant fails to appear for a hearing.

At a minimum, we find that the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct. We would not anticipate that the examination would stop at this point unless the parties stipulate that the applicant's testimony would be entirely consistent with the written materials and that the oral statement would be believably presented.

In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself. We note that there are often significant differences (either discrepancies or meaningful omissions) between the written and oral statements in an asylum application; these differences cannot be ascertained unless an applicant is subjected to direct examination. Moreover, if an applicant is not fully examined under oath there would seldom be a means of detecting those unfortunate instances in which an asylum claim is fabricated. On the other hand, there are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.

We stated in *Matter of Mogharrabi*, 19 I&N Dec. 439, at 445 (BIA 1987), that an alien can demonstrate eligibility for asylum where his "testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." It is difficult for an alien to satisfy this standard unless he presents testimony at his hearing which is consistent with and corroborates any previous written statements in his Form I-589. *See* Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* para. 199-200 at 47-48 (Geneva, 1979). Accordingly, in cases such as the instant one, where the alien's counsel seeks to "rest" his case on a completed Form I-589 and the parties have not entered into a stipulation regarding the contents of the Form I-589, the immigration judge should inform counsel that an alien cannot meet his burden of proof unless he testifies under oath regarding his application. The immigration judge in some cases, for example where an alien is not represented, may wish to question the alien concerning the completed Form I-589. The immigration judge should not, however, proceed to adjudicate a written application for asylum if no oral testimony has been offered in support of that application. *See Matter of Balibundi*, *supra*.

Because the immigration judge here did adjudicate the respondent's asylum application based solely on written statements in the Form I-589, and because this is not a case where there is agreement that the applicant's written statement is believable and that the applicant could have presented oral testimony consistent with that statement, the record will be remanded to the immigration judge for further proceedings in light of this opinion.

ORDER: The record is remanded to the immigration judge for further proceedings consistent with the foregoing opinion and the entry of a new decision.

From:	Kimball, R. Wayne (EOIR)
To:	Davis-Gumbs, Xiomara D. (EOIR); Nugent, James A. (EOIR); Ozmun, Richard (EOIR); Sims, Deitrich (EOIR); Perez-Guzman, Virginia (EOIR)
Subject:	RE: Request for meeting
Date:	Tuesday, March 13, 2018 11:27:07 AM

I have a 1:00 conference call with HQ on Thursday, so if we do a lunch meeting I would need to be back by 1:00.

From: Davis-Gumbs, Xiomara D. (EOIR)
Sent: Tuesday, March 13, 2018 8:27 AM
To: Nugent, James A. (EOIR) <James.Nugent@EOIR.USDOJ.GOV>; Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

Hi Jim,

It depends on how things go with my morning docket. So, I cannot commit for lunch right now.

Xio

Xiomara D. Davis-Gumbs
U.S. Immigration Judge
Dallas Immigration Court
Executive Office for Immigration Review
1100 Commerce Street, Suite 1060
Dallas, TX 75242
214.761.5329

From: Nugent, James A. (EOIR)
Sent: Tuesday, March 13, 2018 6:46 AM
To: Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

Does Thursday lunch work for everyone?

JAN

From: Ozmun, Richard (EOIR)
Sent: Tuesday, March 13, 2018 6:21 AM
To: Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Nugent, James A. (EOIR)

<James.Nugent@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

Early morning or lunch time works for OZ.

From: Kimball, R. Wayne (EOIR)
Sent: Monday, March 12, 2018 6:14 PM
To: Nugent, James A. (EOIR) <James.Nugent@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

I am available anytime except Wed lunchtime.

From: Nugent, James A. (EOIR)
Sent: Monday, March 12, 2018 2:35 PM
To: Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Nugent, James A. (EOIR) <James.Nugent@EOIR.USDOJ.GOV>; Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: Request for meeting

All: The AG's recent vacation of *Matter of E-F-H-L-* has led several of us to question the best way to go forward on clearly non-grantable Asylum/Withholding cases. In addition, the AG's certification of *Matter of A-B* to himself may also call into question of what constitutes a "particular social group". I personally believe that (b)(5) DP [redacted], we may have a much narrower view of what makes up a PSG, perhaps even modifying or overturning *Matter of A-R-C-G-*. A request for an IJ meeting has been made. Please advise as to your availability for a meeting this week or next. As usual, I ask that YOU USE "Reply All" so everyone can be on the same page. Thanks in advance.

On a personal note, my SMU students are starting to show up to observe Court as part of my course's requirements. I ask that you give them all courtesies when they attend Court. If any of them are disruptive, please let me know, and I will take care of it.

Kindest regards,
Jim Nugent, IJ
Liaison Judge
Dallas

From:	Perez-Guzman, Virginia (EOIR)
To:	Nugent, James A. (EOIR); Ozmun, Richard (EOIR); Kimball, R. Wayne (EOIR); Sims, Deitrich (EOIR); Davis-Gumbs, Xiomara D. (EOIR)
Subject:	RE: Request for meeting
Date:	Tuesday, March 13, 2018 7:47:13 AM

Yes.

From: Nugent, James A. (EOIR)
Sent: Tuesday, March 13, 2018 6:46 AM
To: Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

[redacted]
Duplicate

JAN

From: Ozmun, Richard (EOIR)
Sent: Tuesday, March 13, 2018 6:21 AM
To: Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Nugent, James A. (EOIR) <James.Nugent@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

[redacted]
Duplicate

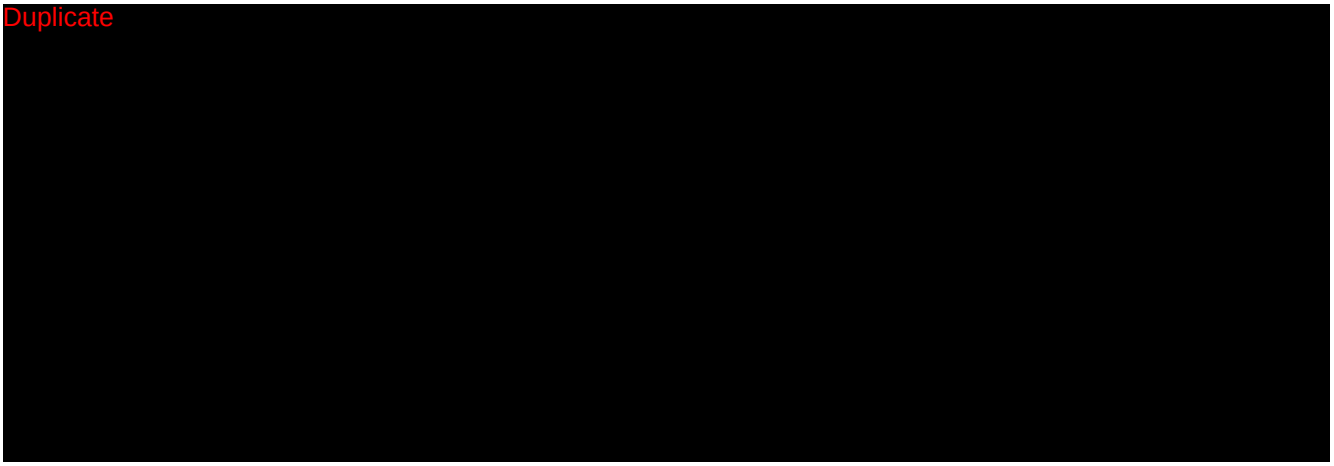
From: Kimball, R. Wayne (EOIR)
Sent: Monday, March 12, 2018 6:14 PM
To: Nugent, James A. (EOIR) <James.Nugent@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

[redacted]
Duplicate

From: Nugent, James A. (EOIR)
Sent: Monday, March 12, 2018 2:35 PM
To: Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Nugent, James A. (EOIR) <James.Nugent@EOIR.USDOJ.GOV>; Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-

Guzman@EOIR.USDOJ.GOV>
Subject: Request for meeting

Duplicate



Kindest regards,
Jim Nugent, IJ
Liaison Judge
Dallas

From:	Perez-Guzman, Virginia (EOIR)
To:	Nugent, James A. (EOIR); Davis-Gumbs, Xiomara D. (EOIR); Sims, Deitrich (EOIR); Ozmun, Richard (EOIR); Kimball, R. Wayne (EOIR)
Subject:	RE: Request for meeting
Date:	Tuesday, March 13, 2018 7:46:52 AM

I am available any early morning and/or lunch.
VPG

From: Nugent, James A. (EOIR)
Sent: Monday, March 12, 2018 3:27 PM
To: Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

Thanks, Xio.

Jim

From: Davis-Gumbs, Xiomara D. (EOIR)
Sent: Monday, March 12, 2018 3:21 PM
To: Nugent, James A. (EOIR) <James.Nugent@EOIR.USDOJ.GOV>; Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: RE: Request for meeting

I am available (7:45 am – 8:25 am) before the start of Court any day this week or next week.

Xio

Xiomara D. Davis-Gumbs
U.S. Immigration Judge
Dallas Immigration Court
Executive Office for Immigration Review
1100 Commerce Street, Suite 1060
Dallas, TX 75242
214.761.5329

From: Nugent, James A. (EOIR)
Sent: Monday, March 12, 2018 2:35 PM

To: Sims, Deitrich (EOIR) <Deitrich.Sims@EOIR.USDOJ.GOV>; Ozmun, Richard (EOIR) <Richard.Ozmun@EOIR.USDOJ.GOV>; Nugent, James A. (EOIR) <James.Nugent@EOIR.USDOJ.GOV>; Kimball, R. Wayne (EOIR) <R.Wayne.Kimball@EOIR.USDOJ.GOV>; Davis-Gumbs, Xiomara D. (EOIR) <Xiomara.Davis-Gumbs@EOIR.USDOJ.GOV>; Perez-Guzman, Virginia (EOIR) <Virginia.Perez-Guzman@EOIR.USDOJ.GOV>
Subject: Request for meeting

Duplicate

[redacted]

Kindest regards,
Jim Nugent, IJ
Liaison Judge
Dallas

From: Gault, Allyson D. (EOIR)
To: Sims, Deitrich (EOIR)
Subject: (b)(6)
Date: Thursday, March 29, 2018 10:44:40 AM
Attachments: 180329 Hernandez Lopez (359) Certification to BIA, Admin Close, MTC, MTT, VD.docx

---

Judge Sims,

Attached is a draft decision for the above case regarding the matters we just talked about and certifying the case to the BIA. I know you didn't ask for a decision, but it was just as easy to write it up in this format as to type it in an email. If I need to change or add anything, let me know.

Best,
Allyson

Allyson D. Gault | **Attorney Advisor**
Department of Justice
Executive Office for Immigration Review
1100 Commerce Street, Ste. 1060
Dallas, TX 75242
(214) 761-5312

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DALLAS, TEXAS

IN THE MATTER OF:	)	IN REMOVAL PROCEEDINGS
	)	(Detained)
(b)(6) [redacted]	)	
	)	A (b)(6) [redacted]
RESPONDENT	)	

CHARGE: Immigration and Nationality Act § 212(a)(6)(i)

APPLICATION: Motion for Administrative Closure; Motion for Continuance; Motion to Terminate; Post-Conclusion Voluntary Departure under INA § 240B(b)

ON BEHALF OF RESPONDENT:

Cristobal Colindres, Esq.
2508 Thomas Ave., Ste. 227
Dallas, TX 75201

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

, Esq.
Office of Chief Counsel
125 E. John Carpenter Fwy., Ste. 500
Irving, TX 75062

CERTIFICATION BY THE IMMIGRATION JUDGE

Pursuant to 8 C.F.R. § 1003.7, this Court informs the Respondent and the Chief Counsel for the Department of Homeland Security in accordance with the provision of 8 C.F.R. § 1003.1(c), the Respondent's case is hereby certified to the Board for further action in light of the Immigration Judge's decision. The parties are informed that they have a right to make representations before the Board, including the request to make oral arguments and submission of a brief. If either party desires to submit a brief, it shall be submitted to the Dallas Immigration Court within the time prescribed in 8 C.F.R. § 1003.3(c). *See* 8 C.F.R. § 1003.7.

Respondent requests administrative closure in order to seek a 601A provisional waiver from U.S. Citizenship and Immigration Services since he has an approved I-130. The Court will

deny this motion as it finds the Attorney General has divested the Court of the power to grant administrative closure in light of *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018).

In the alternative, Respondent requests a continuance. Respondent has failed to establish good cause for a continuance, in part because he has no relief pending before the Court. Therefore, the Court will deny this motion as well.

Next, Respondent requests the Court terminate his immigration proceedings. Respondent has not provided a legal basis for termination, and the Court notes that the removal charge still applies. DHS also opposes this motion. Therefore, the Court will deny this motion.

Finally, Respondent requests post-conclusion voluntary departure under INA § 240B(b)(1). DHS did not oppose Respondent's request. However, in order to be statutorily eligible for post-conclusion voluntary departure the applicant must have been "physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served." INA § 240B(b)(1)(A). Respondent entered the United States on June 1, 2011, and DHS served him with a notice to appear on June 2, 2011. Thus, Respondent lacks the required year of physical presence in the United States and is not statutorily eligible. *See id.* Consequently, the Court will deny Respondent's request for post-conclusion voluntary departure.

Accordingly, the following orders shall be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Reopen be **DENIED**.

IT IS FURTHER ORDERED that the record be certified to the Board of Immigration Appeals.

Date: March 29, 2018
Dallas, Texas

_____
Deitrich H. Sims
Immigration Judge

From:	Lane, Denise (EOIR)
To:	Sims, Deitrich (EOIR)
Subject:	RE: Matter of E-F-H-L 27 I&N Dec. 226 (A.G. 2018)
Date:	Thursday, March 29, 2018 1:15:59 PM

Congrats

From: Sims, Deitrich (EOIR)
Sent: Thursday, March 29, 2018 12:35 PM
To: Baird, Michael P. (EOIR) <Michael.Baird@EOIR.USDOJ.GOV>; Slavin, Denise (EOIR) <Denise.Slavin@EOIR.USDOJ.GOV>; Lane, Denise (EOIR) <Denise.Lane@EOIR.USDOJ.GOV>
Subject: Matter of E-F-H-L 27 I&N Dec. 226 (A.G. 2018)

To all my interested colleagues:

I just finished issuing an oral decision on the remand from the AG in the Matter of E-F-H-L. Respondent's attorney requested AC to seek a waiver for unlawful presence since the I-130 petition was recently approved. The ACC opposed AC. In light of the AG vacating the BIA's precedent decision and recalendaring the case, I denied AC. Next, the Respondent's attorney requested a continuance. The ACC opposed a continuance. I denied the continuance because no good cause and no relief before the court. Next, the Respondent's attorney requested termination. The ACC opposed termination. I denied termination because no legal basis to terminate because the EWI charge is still valid. Next, the Respondent requested post conclusion voluntary departure. The ACC had no opposition to post conclusion voluntary departure. I denied the respondent's request for voluntary departure based on statutory grounds. The respondent had not been in the United States for 1 year prior to the notice to appear being served on him. The respondent reserved appeal and the government waived appeal. So, I have finish the case for now. Stay tune.

Deitrich